



Santa Clara Law Review

Volume 25 | Number 1

Article 7

1-1-1985

Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages

Denise M. DeRose

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Denise M. DeRose, Comment, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages*, 25 SANTA CLARA L. REV. 191 (1985).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol25/iss1/7>

This Comment is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

ADULT INCEST SURVIVORS AND THE STATUTE OF LIMITATIONS: THE DELAYED DISCOVERY RULE AND LONG-TERM DAMAGES

I. INTRODUCTION

Presently, an incest¹ victim can only initiate a personal injury suit on or before her nineteenth birthday because the statute of limitations has run one year after she attains majority. Current research, however, indicates that injury to incest survivors is both long term and slow to manifest itself.² This newly-aired information exposes the harshness of the statute of limitations as applied to incest cases. This comment argues that application of the delayed discovery accrual exception to the statute of limitations is appropriate for damages suffered by adult incest survivors. The comment also explores existing California statutory and equitable exceptions to the standard application of the statute of limitations. Additionally, the reasoning and policy underlying presently existing exceptions will be applied to

• 1985 by Denise M. DeRose

1. The best definition of incest for the purposes of this comment is that offered by S. BUTLER, *CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST* (1978). She defines "incestuous assault" as "any manual, oral or genital sexual contact or other explicit sexual behavior that an adult family member imposes on a child who is unable to alter or understand the adult's behavior because of his or her powerlessness in the family and early stage of psychological development." *Id.* at 405. Butler does not limit the definition to sexual intercourse, but expands it to include "any sexual activity or experience imposed on a child which results in emotional, physical or sexual trauma." *Id.* at 5.

A more complex definition is offered by J. RENVOIZE, *INCEST: A FAMILY PATTERN* (1982):

[F]or our purposes, incest is a sexual relationship that may continue for years or be expressed overtly by nothing more than a single act, that takes place between a young person under the age of consent and an older person who has a close family tie which is either a blood tie . . . or is a substitute for such relationships as with step-parent or parents' lover where the substitute has effectively taken over the role of the missing parent. The sexual acts can vary from exhibitionism to full intercourse: the only essential is that they shall be perceived either contemporaneously or later by the younger person to be of a sexual nature and of sufficient intensity to cause disturbance in that younger person.

Id. at 31.

This comment utilizes the much broader definition of incest given by Butler and Renvoize, and not the one that is established in the CAL. PENAL CODE § 285 (Deering 1983): "Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other" are guilty of incest under the Cal. Penal Code.

2. See *infra* notes 3-25 and accompanying text.

the situation of adult incest survivors.

II. THE DAMAGED SURVIVORS OF INCEST

The term "incest victim" conjures up images of female children ranging in age from infancy to adolescence³ on the witness stand.⁴ Usually, however, one does not think of a twenty-five-year-old office worker,⁵ or a forty-year-old mother of six children.⁶ But these persons, and hundreds of thousands of other adult women who have survived an incestuous past, are all the victims of incest.⁷

In an estimated seventy-five to ninety percent of all incestuous relationships, the incest victim reaches her adult years never having revealed her secret.⁸ Recent scientific literature reveals a predictable

3. In 80% of cases, incestuous conduct begins before the daughters reach the age of 13, the average age being nine. J. L. HERMAN, *FATHER-DAUGHTER INCEST* 83 (1981). Incest also involves male children. However, because the great majority of victims are female, and because the majority of offenders are male, this comment will refer to victims by using feminine pronouns and to offenders by using masculine pronouns. *See id.* at 18-19.

4. A Solano County California Judge received national attention when he held a 12-year-old girl in solitary confinement for eight days when she refused to supply the testimony needed to convict her stepfather of child molestation charges to which he had previously confessed. *Defiance: Solitary for a Twelve Year Old*, *TIME*, Jan. 23, 1984, at 35.

5. Herman describes an adult incest survivor:

A twenty-five year old office worker was seen in the emergency room with an acute anxiety attack The previous day she had been cornered in the office by her boss who aggressively propositioned her It later emerged in psychotherapy that this episode of sexual harassment had reawakened previously repressed memories of sexual assaults by her father.

Id. at 8.

6. Herman describes an adult incest survivor as follows:

A forty-year old mother of six children was admitted to the hospital after ingesting an overdose of sleeping pills. Suicide appeared to her to be the only means of escape from a twenty year marriage to a brutally abusive husband. In psychotherapy she confided that as a child she had been repeatedly molested by her stepfather. Her husband was the only person who knew her secret. She found it impossible to leave her husband because she feared that he would expose her incest history. He had often threatened to use the incest history to prove her an unfit mother and obtain custody of the children should she attempt to divorce him.

Id. at 7-8.

7. Figures are widely divergent in estimating the numbers of women subjected to incest. One researcher stated that 5-15% of the population is involved in incest. J. WOODBURY & E. SCHWARTZ, *THE SILENT SIN: A CASE HISTORY OF INCEST* vi (1971). Another researcher estimated that approximately 1,000,000 American women have been involved with incestuous relations, and that some 16,000 new cases occur each year. D. FINKELHOR, *SEXUALLY VICTIMIZED CHILDREN* 88 (1979); *see* J. RENVOIZE, *supra* note 1, at 42-50.

8. J. RENVOIZE, *supra* note 1, at 51 (1982).

Much writing has documented the unique familial and social situations which accompany incest and enforce upon it a "conspiracy of silence." Incestuous fathers almost uniformly demand secrecy from their daughters, threatening dire consequences for disclosure. S. BUTLER,

and repetitious panoply of emotional, psychological and sometimes physical manifestations of the damage suffered by adult incest survivors years after the incestuous behavior has ceased.⁹

Survivors of incest, having learned to be victims of sexual abuse in their youth, grow up expecting, and indeed receiving further abuse in many aspects of their later lives.¹⁰ Incest survivors show a marked tendency toward self-abuse. Accordingly, substance abuse and addiction, alcohol abuse¹¹ and obesity¹² are found in higher incidence among incest victims.

Not surprisingly, incest survivors demonstrate a pattern of victimization in their adult lives.¹³ The fact that as many as eighty percent of women molested as children have been institutionalized or have engaged in prostitution¹⁴ illustrates this pattern. From their incestuous experience, incest victims develop the belief that their self-worth is derived solely from their sexuality.¹⁵ Thus, incest survivors tolerate extreme abuse in their marriages, often wedding men who will further mistreat and misuse them.¹⁶ The fact that nearly forty percent of adult incest victims have attempted suicide¹⁷ is further

supra note 1, at 32-33; J. L. HERMAN, *supra* note 3, at 88.

When mothers are suspicious of or confronted by reports of incest, they often ignore them, or accuse their daughters of lying because they are afraid themselves of the consequences and implications of the revelation. J. RENVOIZE, *supra* note 1, at 40, 117. Daughters are often the victims of their father's advances through the conscious or unconscious collusion of their mothers. Thus, a daughter risks her mother's abandonment as well as her father's threats if the incest is disclosed. S. BUTLER, *supra* note 1, at 113-14.

If a daughter attempts to disclose the incest to an outsider, or even a professional, she is likewise often disbelieved or rebuffed. S. BUTLER, *supra* note 1, at 37-38. Society's great aversion to the reality of incest prevents outsiders from "hearing" disclosures from victims, thus creating a further barrier to prevent revelation of the familial secret. Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE 609, 616 (1983). Further, daughters are often aware that if the incest is disclosed, it will be seen by many as their fault. J. L. HERMAN, *supra* note 3, at 36-39. Therefore, it is not surprising that so few cases of incest are disclosed by daughters while the daughters live at home.

9. See generally K. MEISELMAN, INCEST (1978).

10. Summit & Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 AM. J. OF ORTHOPSYCHIATRY, 237-51 (1978).

11. A New York study revealed that 44 % of female drug users had experienced incest as children. Other studies revealed figures as high as 70 %. J. RENVOIZE, *supra* note 1, at 160; HERMAN, *supra* note 3, at 99.

12. S. BUTLER, *supra* note 1, at 21.

13. J. L. HERMAN, *supra* note 3, at 29.

14. Gagner, *Female Child Victims of Sex Offense*, 13 SOCIAL PROBLEMS 176, 176-92 (1965); RENVOIZE, *supra* note 1, at 157-60; B. JUSTICE & R. JUSTICE, *THE BROKEN TABOO: SEX IN THE FAMILY* 187-88 (1979) [hereinafter cited as JUSTICE].

15. S. BUTLER, *supra* note 1, at 40.

16. J. L. HERMAN, *supra* note 3, at 101.

17. *Id.* at 99.

proof of the victims' emotional imbalance.

Adults molested as children have severely impaired relationship skills.¹⁸ Incest survivors view other women as they see themselves, as mere sex objects.¹⁹ As a result, they often hold other women in contempt. At the same time, women molested as children often remain distant from men, expecting that the pattern of exploitation which characterized their childhood will recur in their adult relationships.²⁰ This emotional isolation is compounded by the victims' perception that they are different from other people.²¹ Studies reveal that fifty-five percent of incest victims also suffer from some form of sexual dysfunction.²²

The damage caused by incest is generational. Abused children tend to become, or to marry, abusive people. They become parents with a strong likelihood of abusing their own children, and often, consciously or unconsciously permitting others to do so. Therefore, the effects of incest do not end with the incest itself, but can recur as a learned behavior in future generations.²³

The group portrait of adult incest survivors is a painful one. They are a damaged people, with the greatest damage springing from the violation of their trust in the love of a father or stepfather.²⁴

To summarize the question of harm: the preponderance of evidence suggests that for any child, sexual contact with an adult, especially a trusted relative, is a significant trauma which may have long lasting deleterious effects [S]exual abuse does increase the risk that the victims will experience a variety of difficulties in later life Women who have been initiated into sex prematurely by an act of exploitation appear particularly vulnerable They have more than their share of difficulty developing a positive, self respecting sexual identity and a rewarding sexual life.²⁵

18. JUSTICE, *supra* note 14 at 186-87.

19. J. RENVOIZE, *supra* note 1, at 155. Conversely, other researchers have shown that over one-third of incest victims developed a lesbian identity and orientation. K. MEISELMAN, *supra* note 9, at 245-61; see K. BRADY, FATHER'S DAYS (1979).

20. JUSTICE, *supra* note 14, at 184-85; J. RENVOIZE, *supra* note 1, at 155.

21. JUSTICE, *supra* note 14, at 183-84.

22. J. L. HERMAN, *supra* note 3, at 105; J. RENVOIZE, *supra* note 1, at 155; JUSTICE, *supra* note 1, at 184-87.

23. J. RENVOIZE, *supra* note 1, at 90.

24. *Id.* at 5.

25. J. L. HERMAN, *supra* note 3, at 33-34.

The factual experience of incestual damage has increasingly been documented by the survivors themselves: M. ANGELOU, I KNOW WHY THE CAGED BIRD SINGS, (1970); S. BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST (1978); L. ARMSTRONG, KISS DADDY

In the past, courts were forced to rely solely on the testimony of the plaintiff in evaluating subjectively manifested injuries such as emotional distress. Out of mistrust for what could amount to self-serving testimony, courts have relied historically on artificial and arbitrary classifications when awarding damages for subjective injuries like those suffered by adult incest survivors.²⁶ With the rise of modern psychology, the basis for this judicial caution has been largely removed.²⁷ The expansion of scientific research and literature regarding the very real damages sustained by adult survivors of incest should likewise remove the court's caution in allowing these claims to go forward.

III. ADULT INCEST SURVIVORS AND THE STATUTE OF LIMITATIONS

Incest victims have utilized various tort theories with moderate success in seeking remedies.²⁸ However, the statute of limitations remains the primary stumbling block for adult survivors of incest. The general rule governing the commencement of civil actions is section 312 of the California Civil Procedure Code: "Civil actions, without exception can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."²⁹

The applicable California statutes which govern the remedies sought by incest survivors are section 340, subsection 3,³⁰ and section

GOODNIGHT: A SPEAK OUT ON INCEST (1978); S. FORWARD & C. BUCK, BETRAYAL OF INNOCENCE: INCEST & ITS DEVASTATION (1978); K. BRADY, FATHER'S DAYS (1979); C. VALE ALLEN, DADDY'S GIRL: A MEMOIR (1980).

26. See *Espinosa v. Beverly Hosp.*, 114 Cal. App. 2d 232, 234, 249 P.2d 843, 844-45 (1952). In this early California case, no recovery for emotional distress arising out of negligent conduct was allowed unless the plaintiff also manifested physical harm.

27. See *Molien v. Kaiser Found. Hospitals*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

Molien removed the requirement that physical injury accompany negligently-inflicted emotional distress. The court stated, "With the rise of modern psychology, the basis of this caution . . . was removed." [citation omitted]. *Id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

28. Curry, *How Incest Victims are Making Their Fathers Pay*, San Francisco Chronicle, June 3, 1982, at 45, col. 1; see also Comment, *Tort Remedies for Incestuous Abuse* 13 GOLDEN GATE, 609, 617-28 (1983) (assault, battery, intentional infliction of emotional distress and negligent infliction of emotional distress are discussed as appropriate forms to be utilized in causes of action for incest damages). Invasion of privacy was utilized in *Newlander v. Newlander*, Civ. No. C 319 815 (Los Angeles County Super. Ct., originally filed April 16, 1980).

29. CAL. CIV. PROC. CODE § 312 (Deering 1972).

30. CAL. CIV. PROC. CODE 340 (3) (Deering 1972) reads in pertinent part:

352(a).³¹ When read jointly, these sections mandate that a victim who has sustained incest-related injuries during her minority must bring suit one year from the point at which the cause of action *accrues*. The basic rule governing accrual of the statutory period of limitations states that accrual occurs on the date of injury.³² Because the statutory period begins at the age of majority, any suits brought by an incest survivor for incest experiences occurring during the victim's minority years would be barred at the time of the victim's nineteenth birthday. Strict application of date-of-injury accrual, however, proves highly inequitable for many reasons. The family and society can enforce a "conspiracy of silence" upon incest victims.³³ Moreover, most of the incest-related damages remain latent until the survivor's adult life.³⁴ Furthermore, even when the incest damage becomes apparent, the causal connection between the childhood incest and present psychological damage often remains unknown to the victim.

In many contexts, date-of-injury accrual leads to harsh results.³⁵ Because of this, the California courts have long sought ways to avoid manifest injustice and to achieve more equitable judgments. Courts have utilized date-of-discovery accrual, also called the delayed discovery rule, as a means to avoid injustice.³⁶ The delayed discovery

[The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows]:

Within one year:

(3) An action for libel, slander, assault, battery, seduction of a person below the legal age of consent, or for injury to one caused by the wrongful act . . . of another

Id.

31. CAL. CIV. PROC. CODE § 352(a) (Deering 1972) reads in pertinent part:

(a) If a person entitled to bring an action . . . be, at the time the cause of action accrued . . . [u]nder of age of majority; . . . the time of such disability is not a part of the time limited for the commencement of the action.

Id.

32. See *Laltin v. Gillette*, 95 Cal. 317, 320-21 (1892); *Lambert v. McKenzie*, 135 Cal. 100, 103, 67, P. 6, 7 (1901); *Developments in the Law - Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950) [hereinafter cited as Note]; Comment, *Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule*, 108 CALIF. L. REV. 106, 106-07 (1980) [hereinafter cited as *Exceptions Swallow the Rule*].

33. See *supra* note 8.

34. J. RENVOIZE, *supra* note 1.

35. See, e.g., *Priola v. Paulino*, 72 Cal. App. 3d 380, 140 Cal. Rptr. 186 (1st Dist. 1977); *Calabresi v. County of Monterey* 251 Cal. App. 2d 131, 59 Cal. Rptr. 224 (1st Dist. 1967); *Kimball v. Pacific Gas & Elect. Co.*, 220 Cal. 203, 30 P.2d 39 (1934); *Lambert v. McKenzie*, 135 Cal. 100, 103, 67 P. 6, 7 (1901).

36. See *Firth v. Richter*, 49 Cal. App. 545, 196 P. 277 (2nd Dist. 1920). The first exception to the date-of-injury rule appeared in the indirect form of the doctrine of prospective warranty. The plaintiff sued for violation of the warranty when trees he had bought as

rule provides that the statute of limitations does not begin to run at the time of injury, but may be tolled until such time as the plaintiff knows, or through the exercise of reasonable diligence should know, of her injury and its cause.³⁷ With respect to adult survivors of incest, application of the delayed discovery rule would mean that the one year statutory period would run from the date at which the court determined the survivor discovered or should have discovered the harm caused her by the incest.³⁸

The remaining sections of this comment explore areas of California law which currently utilize delayed discovery accrual. The article explores the causes of action available for fraud, constructive fraud, and breach of fiduciary duty as potential vehicles of relief for incest victims. The comment also argues that because the circumstances of incest are similar to those under which delayed discovery accrual has already been granted, a new discovery exception should be created for incest survivors. The comment shows that applying the delayed discovery rule to incest cases does not offend the historical or policy reasons behind the statute of limitations. Finally, the comment offers a set of equitable balancing factors from California case law to use to determine when the statutory period should be extended.

IV. CIRCUMVENTING THE BARRIER: CALIFORNIA APPROACHES

A. *The Fraud Exception*

The 1872 exception for actions on the grounds of fraud³⁹ is California's oldest statutory exception to date-of-injury accrual. The California Legislature has defined fraudulent deceit as follows: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."⁴⁰ The fraud exception provides that an action for relief on the grounds of fraud must be commenced within three years

Valencias bore navel oranges long after the statutory period had run.

37. See generally *Exceptions Swallow the Rule*, *supra* note 32, at 106 (1980).

38. See Brief for Plaintiff, at 2-13, *Newlander v. Newlander*, Civ. No. C 319 815 (Los Angeles County Super. Ct., filed May 26, 1983).

39. CAL. CIV. PROC. CODE § 338.4 (Deering 1972 & Supp. 1984) reads:

An action for relief on the ground of fraud or mistake. The cause of action in that case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

Id. See *Exceptions Swallow the Rule*, *supra* note 32, at 107.

40. CAL. CIV. CODE § 1709 (Deering 1971).

after the aggrieved party *discovers* the facts constituting the fraud⁴¹ regardless of when the fraud occurred. In fraud cases, applying the discovery rule is justified because the plaintiff's ignorance is the result of the deeds or words of the defendant. Hence, the plaintiff's unawareness is central to the wrong⁴² and provides equitable reasons for extending the statutory period. The main quandary is whether incest is a fraud or similar enough to a fraud that one might plead this tort to gain discovery accrual of the statute of limitations.

The elements of fraud which give rise to a tort action for deceit are: (1) material misrepresentation by defendant; (2) defendant's knowledge of its falsity; (3) defendant's intent to defraud; (4) justifiable reliance by plaintiff; and (5) resulting damage to the plaintiff.⁴³ To fit within the fraud cause of action, an incest survivor would have to prove that she was coaxed into sexual participation by a relative's misrepresentation of a material fact which was made to her with knowing falsity.⁴⁴ Further proof would be required to show that the victim justifiably relied to her detriment upon the relative's misrepresentations.⁴⁵ For both legal and factual reasons, manipulation of incest cases to fit the misrepresentation cause of action appears unsuitable in most cases.

California case law asserts that where a complaint and the evidence make out a claim for relief based on fraud, but the fraud is

41. See CAL. CIV. PROC. CODE § 338 (Deering 1972 & Supp. 1984).

42. *Exceptions Swallow the Rule*, *supra* note 32, at 107.

43. 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW 446 (8th ed. 1974).

44. The scienter element of fraud may be frustrated by the fact that fathers who commit incest often rationalize the events. An offender stated, "In my own mind back then I thought I was doing her a favor. I made myself feel that I was not doing anything wrong, that I was actually sexually educating her." J. L. HERMAN, *supra* note 3, at 24; see J. RENVOIZE, *supra* note 1, at 70-71.

Incestuous fathers find many ways to rationalize abuse of their daughters. Blair and Rita Justice categorize the most common misrepresentation patterns in their book *THE BROKEN TABOO*, *supra* note 4, at 67-75.

The rationalizer, they observe, uses lofty words and sentiments as well as plausible sounding reasoning for establishing an incestuous relationship. Some men justify their sexual activity and persuade their daughters on the basis of showing them what love is. Another type of incestuous father misrepresents himself as a teacher and rationalizes the incest as a type of sex education. Other fathers insist that they are protecting their daughters by satisfying the girls' sexual needs so that they will not be exposed to "bad" men. *Id.* at 67-75.

45. An adult incest survivor stated:

I didn't even know that it didn't happen in everybody's family. Daddy told me it was natural and he was just teaching me the facts of life. I never knew that he wasn't telling me the truth. He had books and everything, used diagrams and made me learn the parts of the body. It wasn't until I was in fifth grade that I began to understand that everybody's daddy didn't do that.

S. BUTLER, *supra* note 1, at 31.

only incidentally involved, the date-of-discovery commencement of the statutory period may not always apply.⁴⁶ When the incest victim is able to assert a claim for fraud, the fraud involved is only incidental as the real gist of the claim is personal injury. In cases of fraud, date-of-discovery accrual begins when the plaintiff has actual knowledge, or the means to reach the knowledge that would reveal the fraud.⁴⁷ An incest victim, although perhaps initially deceived by a relative's assertions of propriety, does not often remain deceived for long.⁴⁸ Her cognizance brings her great shame and pain, but also dissolves the factual situation necessary for asserting a cause of action for fraud. If the plaintiff does not justifiably rely on the relative's misrepresentation, no fraud is possible. Many incest victims know the wrongness of their deeds, but continue to participate because of threats or because they feel the incestuous contact is the only contact they can receive. Ironically, these victims lose the benefit of the continued tolling of the statute of limitations at the point of this awareness.

The successful assertion of a cause of action for fraud would bring a limited number of incest victims in under the date-of-discovery exception. However, in the vast majority of incest cases, pursuit of a fraud remedy is an impractical means to escape the standard date-of-injury accrual. Because it is almost certain that actual or constructive knowledge of the incest/fraud will come before the age of majority,⁴⁹ the fraud discovery exception is of little use to adult incest survivors.

Even though the tort of fraud itself is generally an inappropriate legal vehicle for incest survivors, the reasoning which caused courts to allow discovery accrual in cases of fraud may be argued by analogy to extend discovery accrual to incest cases brought under other tort theories.

46. See also *Goodnow v. Parker*, 112 Cal. 437, 44 P. 738 (1896); *San Filippo v. Griffiths*, 51 Cal. App. 3d 640, 645, 124 Cal. Rptr. 399, 403 (1975).

47. *Bainbridge v. Stoner*, 16 Cal. 2d 423, 106 P.2d 423 (1940) held that in alleging the discovery of the fraud after the expiration of the period of limitations, the plaintiff must show that he had no means of knowledge or notice which, followed by inquiry, would have shown the circumstances on which the cause of action is founded.

48. One researcher stated: "Although many of the informants were too young to have a clear idea of the significance of the father's behavior, the father's furtive behavior usually indicated to the daughter that there was something wrong with what they were doing." J. L. HERMAN, *supra* note 3, at 86. See also *supra* note 45.

49. See *supra* note 31.

B. *Undue Influence and Duress*

The combined rigidity of the date-of-injury rule and the narrow fraud cause of action has prompted courts to seek options which would make the discovery exception more widely available. Within the statutory fraud exception, a few decisions⁵⁰ have extended a version of discovery accrual in cases where the defendant exerts undue influence⁵¹ or duress⁵² on the plaintiff.

Undue influence is often inferred from confidential relationships in which a donee has exerted such power over the donor as to cause the donor to confer a benefit against her will.⁵³ Typically, cases of this nature center around the attempted rescission of a contract, or the invalidation of a deed or instrument which was the product of the undue influence the donee exercised upon the donor.⁵⁴ Plaintiffs in these cases allege that the effects of the undue influence or duress practiced by the defendant should toll the statute of limitations.

50. See, e.g., *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 598 P.2d 45, 157 Cal. Rptr. 392 (1979); *Wade v. Busby*, 66 Cal. App. 2d 700, 152 P.2d 754 (1944); *Trubody v. Trubody*, 137 Cal. 172, 69 P. 968 (1902). See also *Triplett v. Williams*, 269 Cal. App. 2d 135, 74 Cal. Rptr. 594 (1969). But see *Marshall v. Packard-Bell Co.*, 106 Cal. App. 2d 770, 236 P.2d 201 (1951).

51. CAL. CIV. CODE § 1575 (Deering 1971) states:

Undue influence consists:

1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;
2. In taking an unfair advantage of another's weakness of mind; or
3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

Id.

52. CAL. CIV. CODE § 1569 (Deering 1971) defines duress as follows:

Duress is:

1. Unlawful confinement of the person of the party, or the husband or wife of such party, or the ancestor, descendant, or adopted child of such party, husband or wife;
2. Unlawful detention of the property of any such person; or
3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive.

Id.

53. Annot., 121 A.L.R. 1294 (1939): "[Undue influence] constitutes a substitute of the will of one person for that of another and deprives [her] of free agency." *Id.*

54. See *Marshall v. Packard-Bell Co.*, 106 Cal. App. 770, 236 P.2d 201 (1951). Here the plaintiff alleged duress in an action for recovery of money from a quasi-contractual benefit paid by plaintiff to the defendant as a result of alleged illegal business compulsion.

In *Triplett v. Williams*, 269 Cal. App. 2d 135, 74 Cal. Rptr. 594 (1969), the remaindermen of a trust established by the will of a deceased wife, brought an action against legatees of the will of the deceased husband alleging that husband had unduly influenced his wife to transfer sums of money into a joint bank account.

When studied, the facts of incest are not distant from those surrounding an instrument or deed which is created by coercion. Incest, like undue influence, is the abuse of a confidential relationship in which one person takes aggressive advantage of another.⁵⁵ In incest cases, however, the property transferred as a result of the undue influence is the child's person rather than land or a trust fund.

In cases of undue influence and duress, some courts apply an even more lenient version of the fraud-based discovery exception to the statute of limitations.

[T]he [statutory] *period begins with the termination of the influence or duress*, the courts sometimes achieving this result by utilizing the fraud exception. While the plaintiff may have knowledge of the essential facts in either case, the later date of commencement recognizes that [s]he will not be likely to sue immediately. Thus, undue influence effectively conceals the wrong resulting from the facts of which [s]he is aware; *persuasion replaces misrepresentation*. . . .

Similarly, where an act or omission is induced by threat or exertion of physical force, the fear that compels submission would ordinarily be sufficient to prevent suit for redress so long as the duress continues. Since the plaintiff is aware of all the relevant facts and their consequences, [s]he is charged with a duty to sue when duress terminates.⁵⁶

The undue influence and duress application of the discovery rule is founded on the belief that the statutory period equitably should not begin to run against a plaintiff until the restrictive effects of the undue influence or duress have concluded. In cases of continued duress or undue influence, the statute of limitations does not run until the duress or undue influence ceases, even though plaintiff previously "discovered" the injury. Given the circumstances surrounding incest, application of this version of the discovery rule would be highly desirable for adult incest survivors.

In most jurisdictions, both duress and undue influence are subcategories of fraud.⁵⁷ California recognizes duress as a form of fraud⁵⁸ and applies the fraud-based discovery exception to such

55. CAL. CIV. PROC. CODE § 1575 (Deering 1971).

56. Note, *supra* note 32, at 1219 (emphasis added); see also Dawson, *Undiscovered Fraud and the Statutes of Limitation*, 31 MICH. L. REV. 591, 610-16 (1933) (discussion of various "constructive frauds" including undue influence) [hereinafter cited as *Undiscovered Fraud*].

57. See *Undiscovered Fraud*, *supra* note 56, at 614-18.

58. O'Neil v. Spillane, 45 Cal. App. 3d 147, 119 Cal. Rptr. 245, 253-54 (1975).

cases.⁵⁹ Only a few California decisions support suspending the statute of limitations *past the time of discovery* in cases of duress⁶⁰ and undue influence.⁶¹ However, there is some indication that courts may accept such an argument in response to the unique facts which characterize incest cases.⁶²

As stated previously, in some undue influence cases, the statute of limitations does not begin to run until the restrictive effects of the

59. *Leeper v. Beltrami*, 53 Cal. 2d 195, 207-08, 347 P.2d 12, 20-21, 1 Cal. Rptr. 12, 20-21 (1959).

60. See *supra* note 56. In *Miller v. Bechtel Corp.*, 33 Cal. 3d 868, 663 P.2d 177, 191 Cal. Rptr. 619 (1983) a woman alleged that she was intimidated into relinquishing stock by threats that her former husband would lose his job if she did not do so. The wife further asserted that because of this intimidation and the great emotional strain, she lacked the capacity to meaningfully consent. She pleaded that these factors should extend the statute of limitations beyond its normal term. The court asserted that *in absence of the allegation that either the effect of her alleged intimidation or her incapacity extended beyond the time she signed the agreement*, the statute of limitations barred her suit. *Id.* at 876, 663 P.2d at 182, 191 Cal. Rptr. at 624.

Therefore, by implication, if a plaintiff asserts that the intimidation exerted upon her by the defendant extended beyond the time of discovery, the statute of limitations would be tolled until the undue influence ceased.

61. See *supra* note 56.

62. In *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 788, 598 P.2d 45, 54, 157 Cal. Rptr. 392, 401 (1979) the court asserts:

Just as the statute of limitations does not run against an action based on fraud so long as the fraud remains concealed, so ought the statute to be tolled *even after the fraud is discovered, so long as the sheer economic duress or undue influence imbedded in the fraud contrives to hold the victim in place.*

Id. (emphasis in original).

This statement reveals the California court's willingness to extend the date-of-discovery exception in cases of *fraud* worsened by undue influence or duress. It does not, however, address the issue of whether the court would be willing to suspend the running of the statute of limitations past the date of discovery in cases of *personal injury* induced by undue influence.

Miller v. Bechtel Corp., 33 Cal. 2d 868, 663 P.2d 177, 191 Cal. Rptr. 619 (1983), *Wade v. Busby*, 66 Cal. App. 2d 700, 152 P.2d 754 (1944), and *Trubody v. Trubody*, 137 Cal. 172, 69 P. 968 (1902) are all in accord in holding that the statute of limitations may be tolled when the plaintiff shows weakness and the defendant asserts undue influence. These cases all mention *fraud* as the basis for action and are concerned with some type of property.

However, in *Leeper v. Beltrami*, 53 Cal. 2d 195, 207, 347 P.2d 12, 20-21, 1 Cal. Rptr. 12, 20-21 (1959) the court stated:

The theory of recovery is not clear. But whether it be considered a suit for restitution to recover money paid under duress, . . . or an action for money had and received sounding in tort, . . . or, simply an action for money damages for the tortious conduct of the defendants resulting in injury to the plaintiffs, the basic nature of the wrongdoing of these defendants is duress.

Id.

Leeper reveals the court's willingness to toll the statute of limitations during the period of duress regardless of the theory of recovery on which the claim is based. Assertions of undue influence or duress may be sufficient to bring a cause of action for money damages resulting from a defendant's tortious and incestuous conduct under the *Wyatt* rule. Thus the statute of limitations would be tolled until the duress or undue influence ends.

undue influence or duress have ceased.⁶³ The reasoning which permits the extension of the statute of limitations in undue influence cases is especially applicable to the unique factual situation of incest. Due to the adverse consequences stemming from the victim's revelation of the incestuous acts, the incest victim is often trapped in a "conspiracy of silence," and like the victim of duress or undue influence⁶⁴ is unable to reveal her secret or to bring a timely cause of action.⁶⁵ An incest victim is influenced by the likelihood that revealing her secret may be at the expense of her relationship with her mother, her family's continued financial support, and her sibling's companionship.⁶⁶ In addition, the incest victim often fears the threats, violence and/or loss of attention from the perpetrator. Accordingly, the victim's fears regarding the detrimental results of such a revelation make a timely enforceable claim against the perpetrator highly unlikely.⁶⁷ Thus, it is clear that the equitable reasons which justify the tolling of the statute of limitations in undue influence and duress cases are equally applicable to incest. If the statute of limitations rationale applied to some undue influence cases⁶⁸ were also applied to incest, the statutory period would not begin to run automatically when the injury was discovered, nor when the victim attained majority. Instead, courts would decide on a case-by-case basis when the victim reasonably could have been expected to act on her own behalf, free from the undue influence or duress occasioned by the perpetrator. In some situations, application of this undue influence extension could provide the most equitable option for adult incest survivors.

C. *Fiduciary Relationships*

The fraud basis for relief has provided a common starting point for many of the discovery accrual exceptions to the statute of limitations.⁶⁹ California courts have given new meaning to the fraud-based

63. See text at note 56 *supra*.

64. *Little v. Bank of Wadesboro*, 187 N.C. 1, 121 S.E. 185 (1924); *Keyton v. Downey*, 81 Ind. App. 431, 143 N.E. 526 (1924).

65. J. L. HERMAN, *supra* note 3, at 130.

66. See *supra* note 8; see also K. MEISELMAN, *supra* note 9, at 185-89.

67. J. L. HERMAN, *supra* note 3, at 129.

68. See *supra* notes 57-63 and accompanying text.

69. See *Undiscovered Fraud*, *supra* note 56, at 607-26; see *Lightfoot v. Davis*, 198 N.Y. 261, 91 N.E. 582 (1910) (larceny with active concealment termed fraud); *Tom Reed Gold Mines Co. v. United Eastern Mining Co.*, 39 Ariz. 533, 8 P.2d 449 (1932) (underground trespass termed fraud).

discovery exceptions in cases when a fiduciary⁷⁰ or confidential⁷¹ relationship exists between the parties. In cases of fiduciary relationships, courts have relaxed the definition of what constitutes a plaintiff's constructive knowledge of her injury⁷² and have increased the duty of the fiduciary to make disclosures to the beneficiary.⁷³ This increased duty of disclosure has created the legal fiction which brings fiduciary relationships within the fraud-based discovery exception.

In *Amen v. Merced County Title Co.*⁷⁴ the California Supreme Court stated,

Cases in which the defendant stands in a fiduciary relationship to the plaintiff are frequently treated as if they involved fraudulent concealment of the cause of action by the defendant. The theory is that *although the defendant makes no active misrepresentation, this element is supplied by an affirmative obligation to make full disclosure, and the non-disclosure itself is a fraud.*⁷⁵

Through this fiction, fiduciary relationships are brought within fraud-based discovery-of-injury accrual for the purposes of the statute of limitations.

Other cases have shown that the fraud fiction raised by a fiduci-

70. See *Dabney v. Philleo*, 38 Cal. 2d 60, 237 P.2d 648 (1951).

71. See, e.g., *Laraway v. First Nat'l Bank*, 39 Cal. App. 2d 718, 104 P.2d 95 (1940).

In *Tidwell v. Richman*, 127 F. Supp. 526 (S.D. Cal. 1953), modified 234 F.2d 361 (9th Cir. 1956), cert. denied, 352 U.S. 1002 (1957), the court held that when there is a confidential relationship, and a *cestui* places reliance on a fiduciary, the California period of limitations does not commence until the time of discovery of the alleged fraud.

72. The California Supreme Court has described this diminished duty as follows: "[D]uring the continuance of this professional relationship, which is fiduciary in nature, the degree of diligence required of a [plaintiff] in ferreting out and learning the negligent causes of his condition is diminished." *Sanchez v. South Hoover Hosp.*, 18 Cal. 3d 93, 102, 553 P.2d 1129, 1135, 132 Cal. Rptr. 657 663 (1976). See also *Bennett v. Hibernia Bank*, 47 Cal. 2d 563, 544, 305 P.2d 20, 35 (1956); *Schneider v. Union Oil Co.*, 6 Cal. App. 3d 987, 86 Cal. Rptr. 315 (1970).

73. See *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 188-90, 491 P.2d 421, 428-30, 98 Cal. Rptr. 837, 844-46 (1971).

74. 58 Cal. 2d 528, 375 P.2d 33, 25 Cal. Rptr. 65 (1962).

75. *Id.* at 534, 375 P.2d at 36, 25 Cal. Rptr. at 68 (citing Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875, 887-93 (1933)); See Note, *supra* note 32, at 1214-17.

When the statutory period on any cause of action springing from a fiduciary relationship lapses without the actual knowledge of the beneficiary, this implies two breaches, one of the fiduciary duty, and the other of a breach of duty for non-disclosure of material facts.

Postponement of accrual of the cause of action until the client discovers, or should discover, the material facts in issue vindicates the fiduciary duty of full disclosure; it prevents the fiduciary from obtaining immunity for an initial breach of duty by subsequent breach of obligation of disclosure.

Neel, 6 Cal. 3d at 189, 491 P.2d at 429, 98 Cal. Rptr. at 845.

ary's failure to make affirmative disclosures is *not* necessary to trigger discovery accrual. The very existence of a cause of action against a fiduciary makes discovery accrual applicable.⁷⁶ Early cases limited discovery accrual to instances when the fiduciary had some *professional* obligation to the plaintiff.⁷⁷ However, later California cases illustrate that discovery accrual is not limited to causes of action against professionals.⁷⁸

The special characteristics of particular fiduciary relationships have led courts to further soften the application of the discovery exception to the statute of limitations. Courts require a lesser standard of diligence where informal confidential relationships exist than is required in legally established fiduciary relationships.⁷⁹ In some types of fiduciary relationships, the statute of limitations does not begin to run until the fiduciary relationship has terminated and an accounting has been rendered.⁸⁰ Furthermore, in cases involving fiduciary relationships, the plaintiff asserting discovery of damage or injury need not prove that no means of earlier knowledge of the damage existed. She need only "establish facts sufficient to show that [s]he made an actual discovery of *hitherto unknown information*

76. *Amen*, 58 Cal. 2d at 534, 375 P.2d at 36, 25 Cal. Rptr. at 68; *Rafter v. Hurd*, 136 Kan. 127, 129, 12 P.2d 837, 839 (1932); *Undiscovered Fraud*, *supra* note 56, at 610-21.

77. This principle has been applied in actions against the following fiduciaries: trustees—*Courtelyou v. Imperial Land Co.*, 166 Cal. 14, 134 P. 981 (1913); stockbrokers—*Twomey v. Mitchum, Jones & Templeton, Inc.*, 262 Cal. App. 2d 690, 69 Cal. Rptr. 222 (1968); escrow agents—*Amen v. Merced County Title Co.*, 58 Cal. 2d 528, 375 P.2d 33, 25 Cal. Rptr. 65 (1962); insurance agents—*Walker v. Pacific Indem. Co.*, 183 Cal. App. 2d 513, 6 Cal. Rptr. 924 (1960); real estate agents—*Allsopp v. Joshua Hardy Mach. Works*, 5 Cal. App. 228, 90 P. 39 (1907); accountants—*Moonie v. Lynch*, 256 Cal. App. 2d 361, 64 Cal. Rptr. 55 (1967); physicians—*Huysman v. Kirsch*, 6 Cal. 2d 302, 57 P.2d 908 (1936); attorneys—*Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).

78. *Exceptions Swallow the Rule*, *supra* note 32, at 106-12. Cases decided after *Neel* have utilized the fiduciary relationship reasoning to extend the discovery exceptions beyond the professions listed in note 77. A California court in *Seelenfreund v. Terminix of N. Cal., Inc.* 84 Cal. App. 3d 133, 148 Cal. Rptr. 307 (1978) extended the delayed discovery rule to termite inspections which were made negligently and in *Allred v. Bekins Wide World Van Serv.*, 45 Cal. App. 3d 984, 120 Cal. Rptr. 312 (1975) to goods packaged in vermin-infested packing material. This expansion reveals that the utilization of the discovery exception is not limited to those cases involving a *professional* obligation. The discovery exception may also be invoked in nonprofessional relationships where a cogent reason exists for the tardy discovery of injury.

79. Note, *supra* note 32, at 1216; See *Knapp v. Knapp*, 15 Cal. 2d 237, 100 P.2d 759 (1940); *Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412, 159 P.2d 958 (1945); *Dabney v. Philleo*, 38 Cal. 2d 60, 237 P.2d 648 (1951); *Bennett v. Hibernia Bank*, 47 Cal. 2d 540, 305 P.2d 20 (1956); *Schaefer v. Berinstein*, 140 Cal. App. 278, 295 P.2d 113 (1956); *Sidebotham v. Robinson*, 216 F.2d 816 (9th Cir. 1954).

80. Note, *supra* note 32, at 1216; But see *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*, 1 Cal. 3d 586, 596, 463 P.2d 770, 776, 83 Cal. Rptr. 418, 423-24 (1970).

within [the statutory period]."⁸¹

These more lenient applications of the date-of-discovery exception in cases of fiduciary and confidential relationships are very helpful to extend the causes of action of the adult incest survivors. Almost all adults molested as children are aware of some emotional or physical trauma at the time of the incest itself. Therefore, the discovery exception, under its standard meaning, would be of little use to incest victims unless the plaintiff's duty of inquiry were relaxed. The less rigorous duty of inquiry required in confidential relationships works to the advantage of incest survivors by tolling the statute of limitations if previously unknown information is uncovered.⁸²

The same beneficial tolling will occur if the adult incest survivors are able to analogize their incestuous relationships to commercial fiduciary relationships where the statute of limitations does not begin to run until the fiduciary relationship is finally terminated and an "accounting" is made.⁸³ This analogy, like the undue influence reasoning discussed previously, would lead to a factual determination as to when the fiduciary aspect of the parent-child relationship concluded. Perhaps, under this theory, a civil claim could be initiated after an extended period following the victim's nineteenth birthday.

Finally, perhaps most importantly, research reveals that most incest victims become aware of previously unknown emotional damage caused by the incestuous relationship long after they reach adulthood.⁸⁴ Thus, the discovery of "hitherto unknown information" such as the nature, extent, or causation of incest-related psychological injury would begin the running of the statutory period.⁸⁵ If courts ac-

81. *Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412, 442, 159 P.2d 958, 975 (1945).

82. *See supra* note 79.

83. *See supra* notes 80 and notes 8-28 and accompanying text

An "accounting" signifies that the fiduciary relationship is over and that the fiduciary must now account to the beneficiary as to how the subject of the fiduciary relationship was handled.

To form an analogy between the commercial fiduciary relationship and an incestuous relationship requires the court to determine when the parental fiduciary relationship ended for purposes of beginning the statute of limitations. The topic of the trial would be an "accounting" as to how the fiduciary handled the child.

84. *See supra* notes 8-28 and accompanying text.

85. In *Newlander v. Newlander* Civ. No. C 219 815 (Los Angeles Cty., Super. Ct., 1983) the plaintiff, Lorey Newlander stated that she was unaware that she had been damaged by her incestuous experiences until she had therapy after an abortion. Shortly thereafter, she had a nervous breakdown, was hospitalized and later came to understand that she was injured as a direct and proximate result of the incest. *Id.* (citing Brief for Plaintiff at 13).

The authority of Lorey Newlander's experience of "hitherto unknown facts" is graphically illustrated by the experience of Evelyn, another adult incest survivor:

When I was seventeen I had my first consenting sexual relationship with a man

cept incestuous relationships as analogous to fiduciary relationships, the possibility of a less stringent application of the statute of limitations will provide hope for adult incest victims.

Under California law, parent-child relationships are considered fiduciary relationships.⁸⁶ Although most fiduciary relationships are governed by standards of professional negligence,⁸⁷ the parent-child fiduciary relationship is governed by the standard of reasonableness.⁸⁸

Since the law imposes on the parent a duty to rear and discipline his child and confers the right to prescribe a course of reasonable conduct for its development, the parent has a wide discretion in the performance of his parental functions, but that discretion *does not include the right willfully to inflict personal injuries beyond the limits of reasonable parental discipline.*⁸⁹

and suddenly was flooded with memories which had been repressed about sexual behavior between my father and me. It was really overwhelming, and I was unable to remember what had been buried for more than five years The power of the things I do remember was so great that I had to close everything off.

S. BUTLER, *supra* note 1, at 48.

86. Cf. *MacDermot v. Hayes*, 175 Cal. 95, 106, 170 P. 616 (1917); *In re Estate of Snowball*, 157 Cal. 301, 107 P. 598 (1910); *Burrows v. Jorgensen*, 323 P.2d 150, 158 Cal. App. 2d 644 (1958); *Menick v. Goldy*, 131 Cal. App. 2d 542, 280 P.2d 844 (1955).

California has arguably created a fiduciary duty between parent and child by statute as well as through case law. In 1974, the legislature passed the Uniform Parentage Act. California Civil Code Section 7001 was adopted as part of the Act; it reads in pertinent part:

"[P]arent and child relationship" means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

CAL. CIV. CODE § 7001 (added by ch. 244, § 11, Stat. 1975) (West 1983).

87. The elements of professional negligence are:

- 1) the duty of the professional to use skills, prudence and diligence as other members of his profession commonly possess and exercise;
- 2) breach of that duty;
- 3) a proximate causal connection between negligent conduct and resulting injury; and
- 4) actual loss or damage resulting from professional's negligence.

Budd v. Nixen, 6 Cal. 3d 195, 200, 491 P.2d 433, 436, 98 Cal. Rptr. 849, 852 (1971). *But see supra* note 78.

88. The *Gibson* court stated:

The standard to be applied is the traditional one of reasonableness, but viewed in light of the parental role. Thus, we think the proper test of a parent's conduct is this: what would an ordinarily reasonable and prudent *parent* have done in similar circumstances?

Gibson v. Gibson, 3 Cal. 3d 914, 921, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971) (action for negligence against parent).

89. *Emery v. Emery*, 45 Cal. 2d 421, 429-30, 289 P.2d 218, 224 (1955) (action for intentional tort) (emphasis added); *see also Gillett v. Gillett*, 168 Cal. App. 2d 102, 335 P.2d

Incest is neither reasonable nor within the bounds of parental discretion.⁹⁰ Incest is a breach of the fiduciary duty of a parent to his child.⁹¹ Thus, the date-of-discovery exceptions which obtain when a fiduciary relationship has been breached should include incest as a breach of parental fiduciary responsibility. A softened application of the statute of limitations would provide quite hopeful remedial possibilities for adult incest survivors.

D. *Professional Malpractice*

Medical and professional malpractice suits have consistently utilized the California delayed discovery rule.⁹² Similarities exist be-

736 (1959) (action for intentional tort with stepmother).

90. Codified evidence of the societal taboo against incest is found in CAL. PENAL CODE § 285 (incest); § 286(C) (sodomy with a minor); § 288a(b)(2) (oral copulation with a minor under violent circumstances); and § 288 (lewd and lascivious acts with children).

The "unreasonableness" of incest is further evidenced in three suits daughters have recently won against their fathers. In *Elkington v. Foust*, 618 P.2d 37 (Utah 1980), a stepdaughter was awarded \$42,000 in damages against her stepfather for sexual assault and battery. In *X v. Melder*, 3 Civil 12125 (Butte Cty. Super. Ct., refiled Feb. 1983) the daughter was awarded \$906,465. In Kalamazoo, Mich., Circuit Court Judge Robert Borsos sentenced Roger Gauntlett, an heir to the Upjohn pharmaceutical fortune, to a year in jail and five years of "chemical castration" with Depo-Provera, an Upjohn product. *TIME*, Feb. 13, 1984, at 73.

91. "A fiduciary relationship arises whenever confidence is reposed on one side, and domination and influence result on the other; [whether] the relation be legal, social, domestic or merely personal." *Estate of Heilman v. Burson*, 37 Ill. App. 3d 390, 345 N.E.2d 536 (1976).

The apparent flaw in the application of the fiduciary duty to incest cases exists in the fact that most legal fiduciary relationships involve two people and an independent property, business, contract, or estate. The essence of the fiduciary relationship arises from the fact that one party, the beneficiary, reposes confidence in the other, the fiduciary. The status of being a fiduciary gives rise to certain legal duties, mainly the obligation to refrain from abusing the confidence of the beneficiary by obtaining any advantage at the expenses of the confiding party. *Bacon v. Bacon*, 150 Cal. 477, 89 P. 317 (1907); *Cover's Estate*, 188 Cal. 133, 204 P. 583 (1922).

In a parent-child relationship where it is asserted that incest is a breach of the fiduciary duty, no independent piece of property, contract, or trust fund exists. The corpus of the trust, instead, is the "corpus" of the child. The breach of the fiduciary duty stems not from mismanagement of a property for the benefit of the fiduciary, but from a transgression of trust. This substitution of the well-being of the child for the property, found in the usual fiduciary relationship, provides a more compelling reason for application of the delayed discovery rule to incest under the fiduciary relationship reasoning.

The reasoning is supported by the fact that doctor-patient relationships are included under the fiduciary relationship discovery exception. Doctor-patient relationships, like parent-child relationships, are not centered around independent property but instead focus on the services that one party gives another. This similarity supports the assertion that incestuous parent-child relationships belong within the discovery exception.

92. *Huysman v. Kirsch*, 6 Cal. 2d 302, 57 P.2d 908 (1936) was the first decision in any state to utilize a date-of-discovery rule for accrual of actions for medical malpractice cases. Once classified within the one-year limit of the CAL. CIV. PROC. CODE § 340, medical mal-

tween the reasons for extending the delayed discovery rule for professional malpractice and the reasons which urge applying it to cases of adult survivors of incest.

Neel v. Magana, Olney, Levy & Gelfand,⁹³ is a critical California decision which applied the delayed discovery rule to actions for professional malpractice against attorneys. In *Neel*, the court set forth reasoning to justify the delay of the limitations period in attorney malpractice actions and in those against all professionals. First, attorneys are obliged to follow not only a standard of reasonable care, but are also bound by a standard of professional care.⁹⁴ Second, because the injury in a legal malpractice case may be concealed in technical jargon, it is reasonable to assume that only another professional would detect it.⁹⁵ Third, the fiduciary relationship between attorney and client obliges full disclosure on the part of the attorney, without which he is guilty of fraud. Consequently, failure to disclose an injury in and of itself would automatically invoke the delayed discovery rule.⁹⁶

These three reasons offered by the *Neel* court to justify applying discovery accrual to attorney-client relationships are equally applicable to incestuous relationships. Fathers, like attorneys, are held to a higher standard of care than the ordinary person.⁹⁷ Further, the

practice cases now fall under a separate statute in § 340.5. Section 340.5 provides for a one-year period of limitation from *discovery* of the cause of action, but bars any action filed more than three years from the date of the *injury* unless proof is offered of fraud, intentional concealment or presence of a foreign body.

The principle that a professional negligence or malpractice action does not accrue until discovery, has also been applied to other professionals. *Amen v. Merced County Title Co.*, 58 Cal. 2d 528, 375 P.2d 33, 25 Cal. Rptr. 65 (1962) (escrowholders); *Moonie v. Lynch*, 256 Cal. App. 2d 361, 64 Cal. Rptr. 55 (1967) (accountants); *Twomey v. Mitchem, Jones, & Templeton, Inc.*, 262 Cal. App. 2d 690, 69 Cal. Rptr. 222 (1968) (stockbrokers); *Cook v. Redwood Empire Title Co.*, 275 Cal. App. 2d 452, 79 Cal. Rptr. 888 (1969) (title companies); *United States Liab. Ins. v. Haidinger-Hayes, Inc.*, 1 Cal. 3d 586, 463 P.2d 770, 83 Cal. Rptr. 418 (1970) (insurance agents).

Haidinger-Hayes set forth the general rule that in actions for *all professional malpractice*, the cause of action does not accrue until the plaintiff discovers, or should have discovered the negligence. The lone exception to that rule, legal malpractice cases, was eliminated in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).

93. 6 Cal. 3d 176, 187-88, 491 P.2d 421, 428-29, 98 Cal. Rptr. 837, 844 (1971).

94. *Id.*

95. *Id.*

96. *Id.* at 188-89, 491 P.2d at 429, 98 Cal. Rptr. at 845.

97. *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) held that parents should be held to a higher standard than the usual objective reasonableness standard because of their position as parents. See *supra* note 88. This elevated duty is comparable to the elevated duty attorneys have with their clients.

This duty was offered in *Neel* as a reason to extend the discovery exception to legal

damage resulting from incest, the "incest syndrome" is akin to the damage resulting from attorney malpractice. For example, like the injury inherent in a faulty will, incest related injury is displayed openly on the "page" of the victim's character and personality. However, such damage often remains uncomprehended and thus undiscovered until a professional examination by a therapist or a counselor occurs. The necessity for professional examination which results in the discovery of the injury, likens incest to legal and professional malpractice for purposes of discovery accrual.⁹⁸

In *Neel*, the court further justified the application of the delayed discovery rule by emphasizing the fiduciary duty between the parties.⁹⁹ This factor as well as much of the reasoning in the *Neel* decision, is especially applicable to the factual circumstances in the cases of adult survivors of incest. "Where the reason is the same, the rule should be the same."¹⁰⁰ Thus, date-of-discovery accrual which applies to professional malpractice should also apply to incest.

E. *Inherently Undiscoverable Injuries*

California courts have regularly refused to apply time-of-injury accrual in cases when the nature of the injury makes the injury diffi-

malpractice; "the special obligation of the professional is exemplified by his duty not merely to perform his work with ordinary care, but to use the skill, prudence and diligence commonly exercised by practitioners of his profession." 6 Cal. 3d 176, 188, 491 P.2d 421, 428-29, 98 Cal. Rptr. 837, 844. Thus, when this elevated duty exists, as in parent-child relationships, there also exists a reason to extend the discovery exception.

98. This reasoning is well explained in the medical malpractice context in *Burns v. Bell*, 409 A.2d 614, 616 (D.C. 1979). Here the court noted that in medical malpractice cases, the patient is often unaware of his injury both because of his tendency to rely on his physician's care and because many medical injuries do not become apparent to a lay person for many years. The court held that the delayed discovery rule applied to all medical malpractice cases, reasoning that when an injury is not apparent, the discovery rule strikes a fair balance between the plaintiff's right to seek judicial relief and the medical defendant's interest in freedom from stale claims. *Id.* See generally *Huysman v. Kirsch*, 6 Cal. 2d 302, 57 P.2d 908 (1936); *Costa v. Regents of Univ. of Cal.*, 116 Cal. App. 2d 445, 454-55, 254 P.2d 85, 91 (1953); *Garlock v. Cole*, 199 Cal. App. 2d 11, 18 Cal. Rptr. 393 (1962); *Mock v. Santa Monica Hosp.*, 187 Cal. App. 2d 57, 64, 9 Cal. Rptr. 555, 560 (1960); *Hundley v. St. Francis Hosp.*, 161 Cal. App. 2d 800, 327 P.2d 131 (1958); *N.H. Howe v. Pioneer Mfg. Co.* 262 Cal. App. 2d 330, 340-41, 68 Cal. Rptr. 617, 623-24 (1968).

In *Warrington v. Charles Pfizer & Co.*, 274 Cal. App. 2d 564, 80 Cal. Rptr. 130 (1969), the plaintiff did not realize there was a connection between the drug she had ingested at her doctor's order, the bodily distress she experienced during pregnancy, and the cerebral palsy affliction of her son, until her attorney suggested the drug might have been responsible.

Likewise, in incest cases damages are often not "discovered" by the plaintiff until a professional suggests the linkage not perceived by the plaintiff's unprofessional eye.

99. 6 Cal. 3d 176, 190, 491 P.2d 421, 429, 98 Cal. Rptr. 837, 845 (1971).

100. CAL. CIV. CODE § 3511 (Deering 1983).

cult to discover within the statutory period. Courts have granted equitable exceptions to plaintiffs when there is a "lack of actual or perceptible trauma"¹⁰¹ at the time of the initial injury. When an "insidious and creeping disease"¹⁰² renders the timely discovery of the injury improbable, the delayed discovery rule has been applied. Furthermore, when "a silent and insidious onset of injury or its effects"¹⁰³ makes discovery of the initial injury within the statutory period unlikely, courts have also utilized the date of discovery to commence the statutory period.

Workers' compensation cases are early examples of discovery accrual for inherently unknowable injuries. In *Marsh v. Industrial Accident Commission*,¹⁰⁴ employees worked in a dust-laden atmosphere. They did not become aware that the dust was the cause of their serious health impairments until after the statutory period had run. The court held that the statute of limitations should not interfere with an injured employee's right to compensation during the period in which the employee was reasonably ignorant of the cause of the disability.¹⁰⁵

In a workers' compensation case for silicone lung disease, the court held:

No specific date of contact with the substance can be charged with being the date of injury, in as much as the *injurious consequences of the exposure are the product of a period of time rather than a point of time*; consequently the afflicted employee can be held to be "*injured*" only when the accumulated effects of the deleterious substance manifest themselves.¹⁰⁶

Incest injuries, like those of silicone dust, often do not manifest

101. *Rubino v. Utah Canning Co.*, 123 Cal. App. 2d 18, 27-28, 266 P.2d 163, 168 (1954) (quoting *Warrington v. Pfizer & Co., Inc.*, 274 Cal. App. 2d 564, 567, 80 Cal. Rptr. 130, 131 (1969)).

102. *Anderson v. Southern Pacific Co.*, 231 Cal. App. 2d 233, 41 Cal. Rptr. 743, 747 (1964) (quoting *Warrington v. Pfizer & Co., Inc.*, 274 Cal. App. 2d 564, 567, 80 Cal. Rptr. 130, 131 (1969)).

103. *Warrington* at 567, 80 Cal. Rptr. at 131-32; see generally *Ricciuti v. Voltare Tubes, Inc.*, 277 F.2d 809, 812 (2d Cir. 1960).

104. 217 Cal. 338, 18 P.2d 933 (1933).

105. *Id.* at 351-52, 18 P.2d at 938-39.

106. *Associated Indem. Corp. v. Industrial Accident Comm'n*, 124 Cal. App. 378, 381, 12 P.2d 1075-76 (1932) (emphasis added). See *Urie v. Thompson*, 337 U.S. 103 (1949); *Young v. Clinchfield R.R. Co.*, 288 F.2d 499, 502 (4th Cir. 1961); *Coots v. Southern Pac. Co.*, 49 Cal. 2d 805, 332 P.2d 460 (1958); *Argonaut Inc. Co. v. Industrial Accident Comm'n*, 231 Cal. App. 2d 111, 41 Cal. Rptr. 628 (1964); *Beveridge v. Industrial Accident Comm'n*, 175 Cal. App. 2d 592, 346 P.2d 545 (1959); but see *Turdich v. Industrial Accident Comm'n*, 237 Cal. App. 2d 455, 47 Cal. Rptr. 21 (1975).

themselves at the time the injury occurs. Clinical psychologists who specialize in the treatment of incest syndrome agree that the injury to an incest victim most often does not manifest itself until the victim's later life. The damage frequently reveals itself when the incest survivor gives birth to her first female child.¹⁰⁷

Further parallels to delayed discovery situations are revealed in a recent case brought against a doctor and drug manufacturer. In *Warrington v. Pfizer & Co., Inc.*,¹⁰⁸ the pregnant plaintiff, under the assurance of her doctor, took a drug which resulted in her illness and in the cerebral palsy affliction of her son. Here the court stated:

When personal injury is suffered without perceptible trauma and by silent and insidious impregnation as a consequence of the act or omission of another, who knows, or is charged with the responsibility of knowing that such act may result in personal injury, and *the injured person is unaware of the cause of [her] injury, and could not, . . . without specialized knowledge have been made aware of such cause*, no action for tort resulting from such cause begins to accrue until the injured person knows or . . . should have discovered the cause of such injury.¹⁰⁹

In *G. D. Searle & Co. v. Superior Court*,¹¹⁰ a case involving damage sustained through the use of oral contraceptives, the court applied discovery accrual where "the pathological effect occurs without perceptible trauma and the plaintiff is blamelessly ignorant of the cause of his injury."¹¹¹

The injury of incest is in many aspects, similar to these inherently undiscoverable injuries. The injury is often suffered by a child without perceptible trauma.¹¹² It is perpetrated by a relative who knows, or is charged with the responsibility of knowing, that such an

107. *Newlander v. Newlander* Civ. No. C 319-815. Brief for Plaintiff, at 13 (Los Angeles Cty. Super. Ct., filed May 26, 1983); see *supra* notes 86-91 and accompanying text.

108. 274 Cal. App. 2d 567, 80 Cal. Rptr. 130 (1960).

109. *Id.* at 569-70, 80 Cal. Rptr. at 133 (emphasis added).

110. 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975).

111. *Id.* at 25, 122 Cal. Rptr. at 220; see, e.g., *In re N. Dist. of Cal.*, 503 F. Supp. 194 (N.D. Cal. 1980) (where the "pathological effects without perceptible trauma" standard is applied to a Dalkon shield injury).

112. Research shows that the vast majority of incestuous relationships do not involve intercourse. Children from the early ages of two to three may be fondled so unobtrusively as to remain unaware that anything untoward is happening. Indeed, most incestuous activity occurs without the use of overt force. A Seattle study reported that only 16% of the victims were made to submit by the use of physical force. However, the emotional trauma which a victim later suffers is not necessarily related to the apparent severity of the activity. J. RENVOIZE, *supra* note 1, at 26-27; see also *supra* notes 8-28 and accompanying text.

act may result in injury.¹¹³ The damage, other than that which is done to the child's body, occurs over a period of time rather than at any particular point in time.¹¹⁴ The harm of the incestuous experience, like a creeping and insidious disease, manifests itself as the child matures and experiences her adult life. An adult molested as a child may be justifiably ignorant of the latent harm resulting from incestuous childhood. Accordingly, a parallel appears between the inherently unknowable injury of incest and the latent disease cases.

The analogy of incest to a latent disease, however, may be an unnecessary exercise. Since 1971, no California cases have applied a statute-of-limitations bar against a tardy plaintiff when the claim of ignorance is supported by reasonable factual allegations.¹¹⁵ In light of this common experience of many incest survivors, the California courts should find incest victims' ignorance of the causes or extent of their incest-related injuries reasonable. To analogize incest damages to these other types of inherently unknowable injuries could bring adult incest survivors within the discovery exception.

F. *Maturation of Harm in Negligence Actions*

Another argument to urge delayed discovery accrual for incest

113. See *supra* notes 85-86 and accompanying text.

114. Research reveals that incest victims suffer from an identifiable and predictable series of problems which manifest a "depressive process." Rarely do the symptoms occur before the age of 16. Hank Giaretto, director of Parents United, a nationally known San Jose sexual abuse program stated,

The story is almost repetitious as far as those of our female adult clients who were molested as children are concerned. Usually there is promiscuity during teen-age [years], drugs, sometimes recourse to prostitution, followed by marriage, then problems with sexual dysfunction. We see it again and again.

J. RENVOIZE, *supra* note 1, at 157-61. See also *supra* notes 8-28 and accompanying text.

115. *Exceptions Swallow the Rule*, *supra* note 32, at 115-16.

Typical of these cases is *Collins v. City of Los Angeles*, 241 Cal. App. 2d 451, 50 Cal. Rptr. 586 (2d Dist. 1966) where after stating "it is the time of the act and not the time of discovery, which sets the statute [of limitations] in motion." *Id.* at 454-55, 50 Cal. Rptr. at 588. The court barred the suit stating that "there was no valid reason for the plaintiffs to wait." *Id.* at 456, 50 Cal. Rptr. at 589. Conversely, given a valid reason for the plaintiff's delay, the statute of limitations would offer no bar.

In *Cain v. State Farm Mutual Auto Ins.*, 62 Cal. App. 3d 310, 132 Cal. Rptr. 860 (1st Dist. 1976), however, the court did not even demand a valid reason for the delay. The plaintiff's bare assertion of delayed discovery survived without further proof. This exception occurred even though the basis of the suit was invasion of privacy, an apparently intrusive injury.

In *Manguso v. Oceanside Unified School Dist.*, 88 Cal. App. 3d 725, 152 Cal. Rptr. 27 (1975), the court applied the discovery-of-injury exception to an action for libel with little reasoning beyond citation to cases applying delayed discovery in other contexts. These cases illustrate the extent of the California courts' movement away from strict date-of-injury accrual.

survivors arises from the notion of maturation of harm under a negligence theory. When harm is an essential element of a cause of action, the statute of limitations may not begin to run until a plaintiff is actually harmed. In actions such as assault, battery, or breach of contract, when the defendant's conduct itself invades the plaintiff's rights, the statute begins to run once the conduct is completed.¹¹⁶ But in causes of action such as negligence or negligent infliction of emotional distress, no cause of action exists unless the plaintiff is *injured*.¹¹⁷

Harm is an essential element in a negligence action. If the statutory period started at the time of the conduct, but prior to the maturation of harm, a plaintiff's remedy would be barred before the cause of action came into existence.¹¹⁸ Therefore, until the plaintiff suffers "appreciable harm" as a consequence of the negligent act, no cause of action for negligence exists. Furthermore, the statutory period cannot commence before the "events have developed to a point where [the] plaintiff is entitled to a legal remedy."¹¹⁹ California courts have displayed their willingness to utilize this "maturation of harm" reasoning in cases of personal injury,¹²⁰ property damage, and negligent infliction of emotional distress.

For example, in *Oakes v. McCarthy Co.*,¹²¹ homeowners brought suit against tract subdividers who had negligently filled and graded their lots. Over a period of years, plaintiffs noticed gradual damage resulting from land subsidence. The court ruled, "Only

116. Note, *supra* note 32, at 1200-01.

117. *Id.*; W PROSSER, *HANDBOOK OF THE LAW OF TORTS* 144 (4th ed. 1971); see e.g., *Essex Wire v. M.H. Hilt. Co.*, 263 F.2d 599 (7th Cir. 1959). Both negligence and intentional tort theories have been utilized in incest cases. See Comment, *Tort Remedies for Incestuous Abuse*, 13 *GOLDEN GATE* 609, 627-28 (1983).

118. See *supra* note 117; see also *Oakes v. McCarthy*, 267 Cal. App. 2d 231, 73 Cal. Rptr. 127 (1968). In *Urie v. Thompson*, 337 U.S. 163 (1948), the United States Supreme Court ruled that a plaintiff could be held to be injured only when "the accumulated effects of the deleterious substance manifested themselves." *Id.* at 170-71. *Urie* gave many jurisdictions an incentive to enact a discovery exception in cases when the plaintiff's injury did not manifest itself as actionable harm for a considerable amount of time.

California decisions regarding professional negligence have held that the mere breach of a professional duty causing only nominal damages, speculative harm, or a threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. See *Budd v. Nixen*, 6 Cal. 3d 195, 200, 491 P.2d 433, 436, 98 Cal. Rptr. 849, 852 (1971); *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 187, 491 P.2d 421, 427, 98 Cal. Rptr. 837, 843 (1971); *Warrington v. Charles Pfizer & Co.*, 274 Cal. App. 2d 564, 566, 80 Cal. Rptr. 130, 1331 (1969).

119. *Davies v. Krasna*, 14 Cal. 3d 502, 513, 535 P.2d 1161, 1168, 121 Cal. Rptr. 705, 712 (1975).

120. *Id.*

121. 267 Cal. App. 2d 231, 73 Cal. Rptr. 127 (1968).

when . . . damage is *sufficiently appreciable to a reasonable man* may we hold an owner to a duty of expeditiously pursuing his remedies."¹²²

Aldaco v. Tropic Ice Cream Co.,¹²³ indirectly established similar reasoning in the context of emotional distress. The *Aldaco* court stated:

[P]hysical effects may not appear immediately after the emotional trauma; indeed, in some cases, a significant period of time may elapse before physical consequences develop. Until the physical effects of the emotional distress appear, the last element essential to a *Dillon* cause of action has not occurred, and events have not developed to a point where the plaintiff is entitled to a legal remedy.¹²⁴

Aldaco is indicative of the California courts' willingness to recognize that the effects of an emotionally distressing experience may not manifest themselves until long after the emotional shock occurs. The *Aldaco* court, however, discussed only the *physical* effects of emotional distress. This element of the negligent infliction of emotional distress cause of action is no longer required under *Molien v. Kaiser Foundation Hospital*.¹²⁵ Therefore, if *Molien* and *Aldaco* are read together, it could be asserted that a negligence cause of action for incest does not accrue until the emotional damage, the "incest syndrome," has manifested itself.

In the incest cases which do not involve violence or intercourse, the actual damages at the time of the incest are nominal.¹²⁶ The further harm that the child will suffer as a result of the incestuous experience is only speculative at the time of the incest itself. It is only when an incest victim appreciates sufficient actual consequent harm that she should be held to the duty of pursuing her remedy in

122. *Id.* at 255, 73 Cal. Rptr. at 142 (emphasis added). See *Fields v. Napa Milling Co.*, 164 Cal. App. 2d 442, 447-48, 330 P.2d 459 (1958).

In *Avner v. Longridge Estates*, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969), the court found that a cause of action for the subsidence of a house, years after the original damage had been noted, would not be barred by the statute of limitations under the rule that each subsidence was a separate cause of action. *Id.* at 617. When applied to incest, this rule of law would analogize the incestuous childhood acts to the laying of a faulty foundation. Each incident of damage arising thereafter from the "foundation" of incest, would initiate a new cause of action, thus avoiding the problem of the statute of limitations.

123. 110 Cal. App. 3d 523, 168 Cal. Rptr. 59 (1980).

124. 110 Cal. App. 3d at 526, 168 Cal. Rptr. at 61 (1980). For listing of factors required for a *Dillon* action see *Dillon v. Legg*, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 69 Cal. Rptr. 72, 80, (discussed in 29 A.L.R. 3d 1316 (1968)).

125. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. (1980).

126. See *supra* note 112.

a negligence cause of action.

An argument may be made that "[a]ny appreciable and actual harm flowing from . . . negligent conduct establishes a cause of action upon which the client may sue."¹²⁷ It would appear that an adult incest survivor, having endured the multiple components of the "incest syndrome,"¹²⁸ has suffered some appreciable harm and therefore is under a duty to pursue her remedy. However, the issue of whether the damages resulting from incest are "sufficiently appreciable, is ultimately a question of fact."¹²⁹ This factual determination procedure should not be cut off by simple demurrer, but made available to adult incest victims.¹³⁰

V. POLICY ISSUES

Three policy reasons have traditionally been offered to justify the strict application of the statute of limitations.¹³¹ The primary rationale supporting the statute of limitations is one of fairness to defendants.¹³² A time should come when a potential defendant "ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations."¹³³ The statute of limitations is further justified as a safeguard against adjudication based on stale evidence. The Supreme Court asserted, "The search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of

127. *Budd v. Nixen*, 6 Cal. 3d 195, 201, 491 P.2d 433, 436, 98 Cal. Rptr. 849, 852 (1971).

128. See *supra* notes 3-28 and accompanying text.

129. *Oakes*, 267 Cal. App. 2d at 255, 73 Cal. Rptr. at 142 (1968). "There are no hard and fast rules for determining what facts or circumstances will compel inquiry by the injured party and render him chargeable with knowledge. It is a question for the trier of facts." *United States Liab. Ins. v. Haidinger-Hayes, Inc.*, 1 Cal. 3d 586, 597, 463 P.2d 770, 776, 83 Cal. Rptr. 418, 424 (1970). See *County of Kern v. Superior Ct. of Kern Cty.*, 82 Cal. App. 3d 396, 400, 147 Cal. Rptr. 248, 251 (1978).

130. See CAL. CIV. PROC. CODE § 597 (Deering 1972 & Supp. 1984). The legislature anticipated the problem of determining the date of discovery and provided a procedure for factual hearings when the issue of statute of limitations bar has been raised.

131. Although the reasons offered here are those traditionally given to justify the existence of the statute of limitations, they might also be offered to justify maintenance of the date-of-injury rather than date-of-discovery accrual. As with the statute of limitations, date-of-injury accrual generally excludes cases. Date-of-discovery accrual, however, achieves an effect closer to that of having no statute of limitations at all.

132. *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342 (1944) (Even if one has a just claim, it is unjust not to put the adversary on notice to defend within the period of limitation).

133. Note, *supra* note 32, at 1185.

documents or otherwise."¹³⁴ The statute of limitations also acts to discourage prospective claimants from sleeping on their rights.¹³⁵

Presently, incest victims are limited in pursuing tort remedies to initiation of a suit on or before the nineteenth birthday, one year after attaining majority. Applying the delayed discovery rule to the causes of action of adult incest survivors could foreseeably facilitate initiating civil actions against the incestuous relatives at any point in a victim's adult life. From a policy standpoint, to determine whether adult incest injuries should be subject to the discovery rule, one must examine the validity of the historical motivations for the statute of limitations.

In situations involving incest, the defendant's interest in a guarantee of repose, or safety from litigation, is a poor reason to deny application of the discovery rule. In limited situations, which are distinguishable from incest cases, this guarantee of repose is dispositive. Doctors, for instance, are granted repose beyond a period of four years from the date of injury.¹³⁶ Unlimited malpractice liability would drive the cost of malpractice insurance and essential medical services too high, and accordingly the extension would be contrary to the public good.¹³⁷ However, there is no public benefit in shielding incest perpetrators from the consequences of their actions, even years after the deeds were committed. Civil law suits act as a deterrent to socially unacceptable behavior. In light of the scope of the incest problem¹³⁸ and the fact that abused children frequently become abusive parents,¹³⁹ the deterrent value of civil suits is especially critical.

134. *United States v. Kubrick*, 444 U.S. 117 (1979). See Williams, *Limitations Periods on Personal Injury Claims*, 48 NOTRE DAME LAW. 881 (1973) "Most actions for personal injuries depend to a great extent upon the testimony of witnesses, and the recollection of such witnesses inevitably becomes less credible with the passage of time." *Id.*

135. Taylor, *Occupational Disease: A Defense Attorney's Point of View*, 12 FORUM 297, 300-01 (1976). "A plaintiff's diligence is required because at some point, the filing of a complaint becomes so distant from the situation which gives rise to the claim as to make the burden of defense intolerable." *Id.*

136. See CAL. CIV. PROC. CODE § 340.5 (Deering 1972).

137. See generally Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

138. See WOODBURY & SCHWARTZ, *supra* note 7; see also D. FINKELHOR, *supra* note 7.

139. The well-documented fact that abused children become abusive parents is noted as follows:

In nearly all of the studies of male sexual offenders that have been done to date, well over half or in some cases nearly three-quarters of the men studied who are serving time in prison were found to have been sexually abused as young boys Therefore . . . from generation to generation, emotional, physical and sexual abuse are behaviors exhibited by men who most likely experienced such abuse

These reasons far outweigh the defendant's need for a guarantee of repose.¹⁴⁰

A stronger argument supporting strict application of the statute of limitations for incest cases is the desire to foreclose claims which are based on stale evidence.¹⁴¹ The problem of faded memories and vague recollections is particularly onerous in delayed civil actions for incest. The evidentiary reasons for strict date-of-injury accrual seem less compelling today, however, than they did in 1623 when the first statute of limitations was enacted.¹⁴²

[I]n 1623 . . . [j]udges were just beginning to see the need for devices to protect against error from jurors' . . . reliance on untrustworthy evidence. The court had not yet developed exclusionary rules [P]arties to the lawsuit were not allowed to be witnesses. A Plaintiff could easily wait until the death or departure of a defense witness to bring an action, knowing that the defendant could not himself testify to rebut the charges. The need for an inflexible statute of limitations to prevent injustices must have seemed greater than it does now when more narrowly tailored evidentiary rules eliminate unreliable evidence.¹⁴³

The modern exclusionary¹⁴⁴ and hearsay¹⁴⁵ rules exclude evidence which are unreliable or may create substantial danger of undue prejudice. The function and effect of the modern rules of evidence¹⁴⁶

in their own childhoods. Sadly, what these men learned from their parents, they learned too well.

S. BUTLER, *supra* note 1, at 67.

140. When the adult incest survivor still has siblings at home, utilization of discovery accrual could forestall their potential abuse. The generational problem of incest may not be addressed, however, by a suit which occurs after the children have experienced the incest and left home. The damage is done. A civil suit, at this point brings direct compensation to the incest survivor for harm done to her. In addition, civil suits bring adult incest survivors opportunity for legal retribution. The societal benefit from retribution stems from publication to potential offenders of the long-lasting and tangible consequences of incestuous activity. Furthermore, providing access to civil suits for adult incest survivors allows them to act as adults, equal in power to their fathers. This balance of power is not possible before the victim reaches adulthood.

141. Note, *supra* note 32, at 1185; see also W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 144 (4th ed. 1971).

142. The Act for Limitation of Actions and For Avoiding of Suits in Law, 21 JAC. I, c. 23 (1623) marked the beginning of the modern law of limitations in the common law. It established different periods of limitation for different theories of liability.

143. Kelly, *The Discovery Rule for Personal Injury Statute of Limitations: Reflections on the British Experience*, 24 WAYNE L. REV. 1641, 1645-46 (1978).

144. CAL. EVID. CODE § 352 (Deering 1983).

145. CAL. EVID. CODE § 1200 (Deering 1983).

146. The strict rules of evidence sometimes work too effectively when excluding potentially unreliable evidence. The rules of evidence exclude many out-of-court statements which

supplant the evidentiary function of date-of-injury accrual.¹⁴⁷ Thus, these rules of evidence alone are sufficient to exclude unreliable or prejudicial evidence proffered during trial.

Although it may be argued that the automatic exclusion of cases under the date-of-injury bar is administratively more expedient,¹⁴⁸ to screen worthy causes of action at the pleading stage rather than through the trier of fact would be an "elevation of procedural effi-

are offered to prove the truth of the matter asserted. Because children make poor witnesses in intimidating court surroundings, it is extremely difficult to elicit sufficient in-court testimony to convict a perpetrator of sexual abuse. In response to this problem, the Washington Legislature has created a new hearsay exception. The exception admits hearsay statements about sexual abuse, by a child under 10, on a finding by the court that the circumstances and content of the statement indicate that it is sufficiently reliable. If the child is unavailable as a witness, the Act requires corroboration of the criminal act as well. WASH. REV. CODE § 9A.44.120 (Supp. 1982); see Comment, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception*, 7 U. OF PUGET SOUND L. REV. 387 (1984); Comment, *Sexual Abuse of Children - Washington's New Hearsay Exception*, 58 WASH. L. REV. 813 (1983).

147. Commentators have asserted that application of the discovery rule to cases of latent disease and asbestos was especially appropriate. Evidentiary problems are not as likely to arise in these cases because asbestos fiber, dust particles, and foreign objects remain in the body and can be clinically substantiated. Recent Cases, *Wilson v. Johns-Manville Sales Corp.*, 52 U. CIN. L. REV. 239 (1983). The implication, therefore, is that where objectively verifiable physical evidence of the damage remains, it is appropriate to extend the delayed discovery rule. Conversely, this implies that where objective physical evidence of the damage (such as silicone particles in the tissue of the lungs) does *not* remain, the delayed discovery should not be applied.

In asbestos and silicone cases, the physical irritants which cause the damage remain preserved as evidence in the body. Incest cases, on the other hand, manifest psychological damages. Unlike asbestos injuries, psychological damages are subjective in nature. Causal evidence of psychological damage remains preserved primarily in the memory of the victim.

The court's unwillingness to discriminate at the pleading stage between psychological and physical harm was made apparent in *Molien*:

"In our view, the attempted distinction between physical and psychological injury merely clouds the issue. The essential question is one of proof; whether the plaintiff has suffered a serious or compensable injury should not turn on [an] artificial and often arbitrary classification . . . To repeat: this is a matter of proof. Screening of claims on this basis at the pleading stage is a usurpation of the jury's function."

Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 930, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980).

Such an "artificial classification" arises when asbestos cases go forward because the particles are preserved in lungs, while incest cases are barred because the "particles" of evidence are preserved in the survivor's memory. This classification becomes yet more arbitrary in light of intensive research which is making the symptoms of incest survivors objectively verifiable.

Although the issue in *Molien* was not the statute of limitations, the case clearly expresses that the court should not, on the basis of a distinction between physical and emotional damages, prevent a case from reaching the trier of fact. Proof remains the central issue, not whether the available evidence is physical in nature as opposed to psychological.

148. See CAL. CIV. PROC. CODE § 597 (Deering 1983).

ciency over substantive justice.”¹⁴⁹ The fact that the court may be forced to review stale evidence is not a dispositive concern. In incest cases, the only alternative to a decision based on imperfect information is to reject the unheard cause of action for violation of society’s greatest taboo.¹⁵⁰

The third historical reason supporting the strict application of the statute of limitations, is that it discourages plaintiffs from sleeping on their rights.¹⁵¹ Applying the delayed discovery rule to adult incest survivors arguably could erode the plaintiff’s incentive to bring suit in a timely fashion. The answer to this argument is obvious. When the emotional and psychological injury of incest is “undiscovered” by the adult plaintiff, a date-of-injury rule provides no incentive for timely filing. If the date-of-injury commencement bars the relief of blameless victims who are as yet unaware of the deleterious effects of past incest, their guarantee of justice is violated. “For every wrong, there is a remedy.”¹⁵² Extending the discovery exception to incest will guarantee the truth of this maxim.

VI. CALIFORNIA’S BALANCING TEST

Obviously, courts must be concerned with equitable decisions for both plaintiffs and defendants. A survey of California case law reveals several factors which the courts have considered to decide when to fairly extend the discovery rule. Taken together, these factors form a useful balancing test which reflects the interests of plaintiffs and defendants in deciding the discovery rule issue. A collective analysis of these factors may provide a court with a fair assessment of whether, in a particular incest case, the delayed discovery rule should apply. The California balancing factors are as follows:¹⁵³

- 1) Whether timely notice was given to the defendant when the

149. *Exceptions Swallow the Rule*, *supra* note 32, at 118.

150. One commentator stated:

The issue boils down to a question of balancing. Is the policy basis . . . [of] avoidance of stale evidence more important than the opportunity for a reasonably diligent plaintiff to seek redress for his injury at all? Both are concerns of justice. But on any scale, the barrier to any hearing at all seems a more drastic imposition on justice than potential harm to the quality of the fact finding process once in court.

Id. at 119.

151. See *supra* note 135 and accompanying text.

152. CAL. CIV. CODE § 3523 (Deering 1984).

153. *Newlander v. Newlander*, Civ. No. C 319 815 (Los Angeles Cty. Super. Ct. May 26, 1983) (quoting Brief for Plaintiff, at 22).

injury was discovered,¹⁵⁴

2) Whether the defendant will suffer prejudice in his right to gather evidence if discovery accrual is allowed,¹⁵⁵

3) Whether the plaintiff acted reasonably or in good faith in making her discovery,¹⁵⁶

4) Whether a fiduciary relationship existed between the parties,¹⁵⁷

5) Whether the plaintiffs used reasonable diligence in seeking professional advice upon the discovery of an injury, and¹⁵⁸

6) Whether there was a rational basis for the delay in discovery.¹⁵⁹

It is difficult to discuss the balancing factors in general without applying them to a particular set of facts.¹⁶⁰ However, when consider-

154. *Cf. Bedolla v. Logan and Frazier*, 52 Cal. App. 3d 118, 129, 125 Cal. Rptr. 59, 67 (1975).

155. *Cf. Electronic Equip. v. Donald H. Seiler & Co.*, 122 Cal. App. 3d 834, 847-48 n.3, 176 Cal. Rptr. 239, 247 n.3 (1981).

156. *Cf. id.* at 855, 176 Cal. Rptr. at 251-52; *Bedolla v. Logan and Frazier*, 52 Cal. App. 3d at 132, 125 Cal. Rptr. at 69.

The first three balancing factors when taken alone constitute the *equitable tolling doctrine* whereby a plaintiff's own acts may be deemed sufficient to toll the running of the statute of limitations against the plaintiff. *Electronic Equip. v. Donald H. Seiler & Co.*, 122 Cal. App. at 847-48 n.3, 176 Cal. Rptr. at 247 n.3. Applications of this doctrine have been made to toll the statute of limitations when, for example, the filing of a workman's compensation claim tolled the limitations statute on a plaintiff's personal injury claim, *Elkins v. Derby*, 12 Cal.3d 410, 115 Cal. Rptr. 641 (1974), or when the statute was tolled when a complaint was timely filled in another state. *Schneider v. Schimmels*, 256 Cal. App. 2d 366, 64 Cal. Rptr. 273 (1967).

157. *Cf. United States Liab. Ins. v. Haidinger-Hayes, Inc.*, 1 Cal. 3d 586, 595-98, 463 P.2d 770, 775-77, 83 Cal. Rptr. 418, 423-25 (1970); *Hobart v. Hobart Estates*, 26 Cal. 2d 412, 439-42, 159 P.2d 958, 973-75 (1945).

158. *Cf. Velasquez v. Fibreboard Paper Products Corp.*, 97 Cal. App. 3d 881, 888-89, 159 Cal. Rptr. 113, 117-18 (1979) (asbestosis now controlled by statute).

159. *Cf. Bennet v. Hibernia Bank*, 47 Cal. 2d 540, 563, 305 P.2d 20, 35 (1956).

160. In *Newlander v. Newlander*, Civ. No. C319 815, (Los Angeles Cty. Super. Ct. May 26, 1983) (quoting Brief for Plaintiff, at 25-26) the facts of the individual case were argued using the California balancing factors as follows:

Weighing all of the above stated factors the equity balances in favor of the plaintiff. Here, there is no prejudice to the defendant in gathering the evidence; the attached deposition demonstrates the contemporaneous *mens rea* of the defendant.

The plaintiff filed this complaint expeditiously once she had knowledge of her injuries; there is no evidence of bad faith on the part of the plaintiff; there is a fiduciary duty established between father and daughter by both statute and case law in California; subsequent to the initial manifestations of injury which were brought about by plaintiff's abortion she sought professional advice in a timely manner; moreover, the existence of the "conspiracy of silence," enhanced by her father, more than accounts for any delay.

ing the second factor of whether the defendant would suffer prejudice in his right to gather evidence, it should be pointed out that prejudice is defined as "a leaning toward one side of a cause for some reason other than a conviction of its justice."¹⁶¹

Any incest case admitted under the discovery exception would necessarily be one in which the plaintiff brought suit within one year of discovery of her injury. The discovery rule is based on the obvious premise that the plaintiff is unaware of her injury until she discovers it. Her unawareness would provide no opportunity for the gathering of prejudicial evidence. Thus, the defendant, because of the nature of "discovery" in an incest case, would be no more prejudiced in his attempts to gather evidence than would the victim. Furthermore, unlike a manufacturer who does not know that an injury has occurred, an incest perpetrator is completely aware of the incest.

Other balancing factors weigh in favor of application of the discovery rule. The existence or violation of fiduciary duty is always present in incest cases.¹⁶² The involvement of professional advice is also likely to be present, since the advice of a counselor or therapist is commonly instrumental in the discovery of the causal connection between the incestuous relationship and the present distress. Furthermore, in incest cases, the delay in timely filing is accounted for by the shame and "conspiracy of silence" which surround any incestuous relationship. Another reason for the delay is the immaturity of the plaintiff. Few teenagers possess adequate knowledge of their legal rights, or sufficient independence from the relative's undue influence in order to bring suit before their nineteenth birthday.

These equitable balancing factors drawn from California case law are mirrored in *Lopez v. Swyer*, a landmark New Jersey case.¹⁶³

The issue will be whether or not a party, either plaintiff or counterclaimant, is equitably entitled to the benefit of the discovery rule. All relevant facts and circumstances should be considered. The determinative factors may include but need not be limited to: the nature of the alleged injury, the availability of witnesses and written evidence, the length of time that has

161. BLACK'S LAW DICTIONARY 1061 (5th ed. 1979).

162. See *supra* notes 69-91 and accompanying text.

163. *Lopez v. Swyer*, 62 N.J. 267, 300 A.2d 563 (1973) (medical malpractice claim regarding radiation therapy administered to the plaintiff).

A statute reflecting factors similar to those which New Jersey discusses has been adopted by the province of Manitoba, MAN. REV. STAT. 1954, c 145 (1967). See Comment, *Statutory Provision for the Enlargement of Limitation Periods-Manitoba*, 47 CAN. B. REV. 106, 107 (1969); cf. McLaren, *The Impact of Limitation Periods on Actionability in Negligence*, 7 ALBERTA L. REV. 247, 254-55, 268-70 (1969).

elapsed since the alleged wrongdoing, whether the delay has been to any extent deliberate or intentional, whether the delay may be said to have peculiarly or unusually prejudiced the defendant.¹⁶⁴

English delayed discovery law has recently undergone several modifications. In 1975, the English Limitations Act was revised to allow personal injury cases a three-year period of limitation running from the plaintiff's knowledge," if "knowledge" is later than the date of accrual.¹⁶⁵ Another portion of the Act established that the action should be allowed to proceed notwithstanding the three-year limit "where it appears to the court equitable to do so."¹⁶⁶ The English courts defined this discretionary power broadly, asserting that discretion could be applied in "all cases where the three year limitation period had expired before the issue of the writ."¹⁶⁷ The British court explained "Parliament has now decided that uncertain justice is preferable to certain injustices or, in other words, that certainty can be bought at too high a price"¹⁶⁸

English courts have been instructed in deciding whether to allow a case to proceed beyond the three-year limitation, to "have regard to all the circumstances of the case" and to six parliamentary guidelines¹⁶⁹ which are quite close to those enunciated in California

164. 62 N.J. at 275-76, 300 A.2d at 567-68.

A great societal taboo exists regarding incest. In applying the New Jersey factors to incest, consideration of this taboo would add weight to the "nature of the alleged injury" and thus encourage extending of the discovery exception.

165. Vickers, *Overriding the Time Bar in Personal Injury Actions*, NEW L.J. 380 (April 17, 1980).

166. *Id.*

167. *Id.*

168. 12 *Firman v. Ellis*, (1978) 2 All E.R. 851, 865.

169. The six English guidelines are as follows:

- a) The length of and reasons for the delay on the part of plaintiff;
- b) the extent to which, having regard to the delay, the evidence adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time limit allowed;
- c) the conduct of the defendant after the cause of action arose, including the extent, if any, to which he repented to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
- d) the duration of any disability of the plaintiff arising after the date of accrual of the cause of action;
- e) the extent to which the plaintiff acted promptly and reasonably once he knew whether the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages; and
- f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice, and the nature of any such advice he may have received.

Vickers, *supra* note 165, at 380-81.

case law. The California balancing factors, as reflected in the six English guidelines and the New Jersey factors, would generally aid adult incest plaintiffs. However, application will have to be argued on a case-by-case basis.¹⁷⁰

VII. CONCLUSION

"When the reason is the same, so should the rule be the same."¹⁷¹ In California, exceptions to date of injury accrual have been allowed when, as in incest cases, the misrepresentations of the defendant conceal the wrong itself. Discovery accrual has been allowed where, as in incest, the plaintiff is prevented from bringing a cause of action by the defendant's exertion of power over her. When, as in incest cases, a confidential relationship exists between the two parties, discovery exceptions have also been made. California has further allowed exceptions to date-of-injury accrual when a plaintiff has relied upon the superior knowledge of the defendant for her well-being, and when the nature of the wrong suffered by the plaintiff was inherently unknowable or insidious in its nature. These rea-

English case law reflects the application of these guidelines to factual situations similar to those of incest.

In *McCafferty v. Metropolitan Police Receiver*, (1977) 2 All E.R. 756, a plaintiff was allowed to bring a cause of action against his employer for loss of hearing after the statutory period. His reason for delay was that he wished to preserve harmonious relations with his employer rather than become involved in litigation. Certainly the incestuous relationship and the "conspiracy of silence" which surrounds it surpasses the reasons the English court found compelling in *McCafferty*.

In *Buck v. English Electric*, (1978) 1 All E.R. 271, the plaintiff was allowed to bring a latent disease case 29 years after exposure, on the court's finding that evidence was sufficient and still available. Here, the sufficiency of proof is the issue, rather than the mechanical application of the statute of limitations. This emphasis on proof rather than deadlines is crucial to adult incest survivors.

In *Marston v. British Railways Bd. & Another*, 1976 Indus. Cas. R. 124, it was asserted that a plaintiff would be allowed to bring a cause of action beyond the limitation period when it was shown that representation made to the plaintiff by the defendant about the injurious activity, caused the plaintiff to delay in bringing suit. This guideline embraces the facts surrounding the fraudulent aspects of incestuous relationships.

170. The more generous statutory period provided by English law suggests a practical option for the California Legislature. California courts likely will fear extending discovery accrual to incest survivors. The openness of the discovery of injury concept in the incest context would leave defendants with little predictable repose. If the California Legislature were to extend the statutory period for incest victims to a period of perhaps five years from majority, such inequity could be avoided on both sides. Fewer victims would be harshly foreclosed from remedy before they consciously experienced the injury of their incest. In addition, less undesirable manipulation of the discovery concept would occur. Defendants would, on the other hand, have a period after which their slates would be wiped clean. Such proposed legislation, however, is beyond the scope of this comment.

171. CAL. CIV. CODE § 3511 (Deering 1984).

sons, which California courts have acknowledged as valid ones for extending date-of-discovery commencement of the statutory period, are common to the plight of the adult incest survivor. That she has been injured, is undeniable, and as research on incest victims continues, her injury may also be scientifically verifiable. The statute of limitations is a housekeeping tool and not a substantive rule of law. Although the statute of limitations has been used as guardian of the courts, to prompt reticent plaintiffs to bring actions, to protect defendants from inequity, and to prevent stale evidence from reaching trial, California courts have shown a tendency to favor justice over good judicial housekeeping. The rules of evidence are sufficiently stringent to prevent unreliable evidence from reaching juries. Furthermore, juries have long displayed the ability to weigh and balance the evidence which does reach them. As the English courts have said, "certainty can be bought at too high a price."¹⁷²

Adult survivors of incest have already paid a high price. They have paid with their lost childhood, with their innocence and with their bodies. To further deny them access to remedy in the courts of law is like "the rust on the razor that threatens the throat. It is an unnecessary insult."¹⁷³

Denise M. DeRose

172. 12 *Firman v. Ellis*, (1978) 2 All E.R. 851, 865.

173. M. ANGELOU, *I KNOW WHY THE CAGED BIRD SINGS* 6 (1969).

